MALAYAN UNION REPORTS.

DOMINIC v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Malayan Union, Murray-Aynsley, C.J., Singapore and Spenser-Wilkinson, J.) March 24, 1947]

War Offences Ordinance, 1941, Section 3—Doing an act likely to endanger life, with intent to help the enemy—International Law.

The appellant in this case was found guilty by the jury on two out of three charges under Section 3 of the War Offences Ordinance. After conviction the learned trial Judge certified that this was a fit case for appeal on the ground that the verdicts were against the weight of the evidence. The learned trial Judge also expressed the view that there was no evidence that the acts done by the appellant were likely to endanger the lives of the two persons, Muriel and Marbeck, whom it was alleged the appellant had reported to the Kempeitai.

Held, (1) that in these cases the test of whether the life of a person reported to the Japanese was likely to be endangered depended on the activities for which he was reported;

(2) that, by reporting Muriel for spreading news of Allied War successes in the Pacific, a matter which was regarded as very serious by the Japanese, the appellant had endangered the life of Muriel, and that therefore he was rightly convicted on this charge;

(3) that there was not sufficient evidence on the record to prove that the appellant gave any information to the Japanese regarding the activities of Marbeck and that the conviction on this charge must be set aside.

Case referred to :—

(1) *De Jager v. Attorney General of Natal* (1907) A.C. 326.

CRIMINAL APPEAL.

W. H. Salt for Appellant.

J. C. Kilner for Respondent.

The judgment of the Court of Appeal was given by :—

Willan, C. J. :—In this case the appellant, P. C. Dominic, was convicted of two offences of treachery contrary to section 3 of the Straits Settlements War Offences Ordinance, 1941. That section is as follows :—

> If, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of treachery and shall on conviction be punishable with death.

That law came into force on the 22nd day of December, 1941, about two weeks after the Japanese invaded Malaya, it remained in force throughout the Japanese occupation of Malaya, and is still the law in force in the Settlement of Malacca, which is British territory, and where the appellant lived and committed the offences of which he was convicted.

Before dealing with the facts of this case it is desirable to set out the principles laid down by the Privy Council in the case of *De Jager v. The Attorney General of Natal*[1]. In that case, which dealt with treachery by an alien resident in Natal, their Lordships (at pages 328 and 329) laid down the following principle :—

> The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled.

There were three charges against the appellant in respect of giving information to one Isa Kigenta, a Sergeant-major in the Japanese Kempeitai, against three persons resident in Malacca. These three persons were George Edward Muriel, Marcus Carvalho and Percy Michael Marbeck, all resident in the Settlement of Malacca.

The charge in respect of Muriel was as follows :—

> From about the 1st day of August, 1944, to about the 30th day of June, 1945, at Malacca with intent to help the enemy did act as informer to one Isa Kigenta, a Sergeant-major in the Japanese Kempeitai, Malacca, and while acting as such informer did give information to the said Isa Kigenta against George Edward Muriel, alleging anti-Japanese feelings, well knowing that such information would lead to the arrest, torture and/or imprisonment of the said George Edward Muriel and by so doing did an act which was likely to endanger the life of the said George Edward Muriel and thereby committed an offence punishable under section 3 of the War Offences Ordinance, 1941, (No. 68 of 1941).

The two remaining charges in respect of Carvalho and Marbeck were in identical terms.

After a summing-up, which in our opinion was favourable to the appellant, the jury returned verdicts of guilty in respect of the charges affecting Muriel and Marbeck, and a verdict of not guilty in respect of the charge affecting Carvalho.

After conviction the learned trial Judge certified that this was a fit case for appeal on the ground that the verdicts were aganist the weight of evidence. Accordingly the appellant appealed to this Court on the following grounds :—

The verdict was against the weight of evidence. The prosecution failed to prove that:—

(1) The reporting by the appellant to the Kempeitai of Muriel or Marbeck was likely to endanger either of their lives.

(2) The arrest and subsequent treatment of Muriel was the result of the report made by the appellant.

(3) That the treatment of Muriel and Marbeck by the Kempeitai was likely to endanger their respective lives.

The evidence in respect of the charge with regard to Muriel is as follows :—

(a) The evidence of Isa Kigenta. This Sergeant-major of the Japanese Kempeitai gave evidence at the preliminary enquiry, and at the trial his deposition was admitted in evidence because, between the date of the preliminary enquiry and the date of the trial, he had been executed by the military authorities after having been convicted of a war crime. The important parts of that deposition are :—

"I took over as informer Dominic . . . . . Dominic was requested by me to work for me . . . . . His duties were to watch for rumour mongers in Malacca . . . . . Rumours mean 'war news' . . . . . Dominic brought information against George Muriel and Marcus Carvalho . . . . . Dominic alleged that these two persons in a coffee-shop in Riverside pointed out on a map the position of the British and Japanese troops. Saipan was one place mentioned; in the Pacific the Allies' bombing of the Japanese was mentioned. On this report I sent for both of them, interrogated and warned them. I then made investigations regarding the report. The investigation lasted about two months, first on Muriel then on Carvalho. Finally I had them both arrested. At first they denied discussing war news. Then I applied the water treatment and beat them; they confessed . . . . . It was against the interests of the Japanese government to allow discussion of war news. If the arrested people had carried on discussing the war news, the confidence of the Malacca people would have been shaken; it was tantamount to anti-Japanese propaganda. It was vital to keep the news of Allied successes from the public".

(b) The evidence of Muriel himself. His evidence was that the appellant had visited his shop and had questioned Muriel about being in possession of photographic equipment, radio spare parts and Local Defence Corps equipment and clothing. Subsequently, on or about the 13th day of August, 1944, the appellant went to Muriel's house and after about an hour, whilst the appellant was still there, Isa Kigenta and a party of Japanese Kempeitai arrived and took Muriel and the appellant to the Japanese Kempeitai head-quarters. Muriel was detained there that night, and next day he was taken to an adjoining building. There the appellant denounced him to Isa Kigenta for using his typewriter to spread British propaganda and for using his photographic equipment for the same purpose. Appellant also told Isa Kigenta that Muriel was holding his Local Defence Corps uniform in readiness for the return of the British. Muriel denied all this and on several days subsequent thereto he was beaten by the Japanese Kempeitai, not in the presence of the appellant, and on four occasions was subjected to the water treatment, again not in the presence of the appellant. Eventually, after being tortured, he confessed to being in possession of a map on which he had marked the various Allied victories in their advance across the Pacific. The Japanese sentenced Muriel to five years imprisonment, and he was only released from prison on the return of the British forces on the 30th day of August, 1945. Due to being tortured by the Japanese he was in a weak condition and has still not completely recovered from the effects of the torture.

(c) The appellant under cross-examination admitted he had informed against Muriel, and added that he thought that the consequence would be that the Japanese would merely warn Muriel.

It was on this evidence that the jury returned a verdict of guilty on the charge relating to Muriel. That verdict was returned in spite of the fact that the learned trial Judge in his summing-up said, inter alia :—

(a) The prosecution has to satisfy you beyond reasonable doubt that the mere fact the accused, if you accept the evidence, reported these persons to the Kempeitai was sufficient in itself to be likely to endanger life. I cannot go too far

in making that point clear. The prosecution has to prove to you that the mere fact of reporting persons to the Kempeitai for pro-British or anti-Japanese sentiments—whatever it may have been —endangered their lives.

(b) You have heard that Muriel was subjected to the so-called 'water treatment' on four occasions; you have heard that he was severely beaten; that he was on one occasion semi-conscious and that he 'found himself' in his cell—have you heard a single word in evidence that anybody was in fact killed; that any single person entered the Kempeitai headquarters and never again emerged alive? Counsel for the defence elicited that the very last thing the Kempeitai desired was to kill anyone who had been reported—they wanted a confession to present to the Court.

(c) The charges allege that the life of the person reported was endangered. Have you heard any medical evidence state that this was the case; have you heard any evidence that any single person in such circumstances did in fact die?

Now the charge against the appellant in respect of Muriel, leaving out the parts which do not apply, was :—

> If with intent to help the enemy any person does any act which is likely to endanger life he shall be guilty of treachery and shall on conviction be punishable with death.

In our view the learned trial Judge, from the extracts of his summing-up set out above failed to appreciate that, in a case of this kind, the test of whether the life of a person reported to the Japanese was likely to be endangered depended on the activities for which he was reported. In the present case there is no doubt that the appellant, who was an informer for the Japanese, reported Muriel for spreading news of Allied war successes in the Pacific. It is clear from the last paragraph of the deposition of Isa Kigenta, set out above, that the Japanese regarded this as a very serious matter. This is common-sense because any enemy forces in occupied territory, be they Japanese or the forces of any other nation, would regard the spreading of such news with considerable alarm, and the act of any informer in causing any person to be arrested for spreading such news would certainly endanger that person's life. Members of the jury are free to use their own common sense and experience in judging of the effect of particular facts and in drawing inferences from those facts. If the appellant had reported Muriel for less heinous offences, such as blackmarket activities, then common sense suggests that such a report would not be likely to endanger life. But the evidence before the jury in this case was of a denunciation of a serious character. We agree with the verdict, in respect of the information given by the appellant against Muriel, that that information, followed immediately as it was by Muriel's arrest by the Kempeitai, was of such a nature as was likely to endanger his life. Accordingly, the appeal against the appellant's conviction in respect of the first charge which relates to Muriel is dismissed.

As regards the conviction in respect of the charge relating to Marbeck, the only evidence against the appellant is that of Marbeck himself, and another person named de Costa. Their combined evidence discloses that the appellant went to Marbeck's house some time about June, 1945, and there a conversation took place between the appellant and Marbeck in the presence of a Tamil, whose identity is not disclosed, and also of Marbeck's wife. According to Marbeck the appellant asked him in that conversation for his views on the British government and also on the Japanese government. Marbeck replied that he had had experience of the British government for twenty years, and considered it a good government. As regards the Japanese government he said that they had only just arrived and he did not know what kind of people they were. The Tamil just mentioned was present throughout this conversation.

Three days later Marbeck was called to the head-quarters of the Japanese Kempeitai and asked if he had said that the British Government was good and that the Japanese government was bad. He denied making such a statement and after being beaten, first with a rubber hose pipe, and then with an ordinary foot-ruler, he was warned about his future conduct and released.

There is not sufficient evidence on the record to prove that the appellant gave any information to the Japanese regarding the activities of Marbeck. Undoubtedly the jury inferred that the appellant had done so because of the short lapse of time between the conversation which took place between the appellant and Marbeck, and the calling of the latter to the Japanese Kempeitai head-quarters. But it must be borne in mind that this unknown Tamil was present at such conversation and he must have been known to both Marbeck and de Costa. There is no explanation on the record of the trial as to why this Tamil was not called as a witness. In our view the evidence does not disclose that it could only have been the appellant who could have informed against Marbeck to the Japanese, and therefore in respect of the charge relating to Marbeck the conviction of the appellant is against the weight of evidence.

Accordingly, we allow his appeal thereon and quash that conviction.

Order Accordingly.